BALACHANDRAN K ARUJUNAN & ANOR v. PP

HIGH COURT MALAYA, GEORGETOWN
MOHD RADZI ABDUL HAMID JC
[CRIMINAL APPLICATION NO: PA-44-4-03-2021]
13 JULY 2021

Abstract – *The power of the court to grant bail is as determined by law. The court merely exercises its powers provided by validly and constitutionally-passed law and if those powers are not granted, it could not then be said that there is an usurpation of the judicial power of the court. Section 41B of the Dangerous Drugs Act 1952 ('DDA') is indeed constitutional and does not in any way curtail an accused's right to access to justice. Parliament is after all competent to pass a law that is discriminatory so long as the law is proportionate to the objective it seeks to achieve. Whilst an accused is presumed innocent until proven guilty, there is a clear need to mitigate flight risks. The creation of class of persons under s. 41B of the DDA ie, those prohibited from accessing bail, is proportionate and justified, taking into account the objective of that law.*

CRIMINAL PROCEDURE: *Bail – Application for – Application for bail premised on medical issues and gender – Appeal against Magistrate's decision – Magistrate denied bail – Whether s. 41B of Dangerous Drugs Act 1952 amounted to usurpation of judicial power of court – Whether s. 41B ultra vires arts. 4, 5, 8 and 121 of Federal Constitution – Whether there was presumption of constitutionality of s. 41B – Exercise and limits of judicial power to grant or not to grant bail – Whether s. 41B took precedence over s. 388(1) of Criminal Procedure Code*

CONSTITUTIONAL LAW: *Federal Constitution – Constitutionality – Constitutionality of s. 41B of Dangerous Drugs Act 1952 – Whether s. 41B unconstitutional as not passed pursuant to art. 149 of Federal Constitution – Whether s. 41B amounted to usurpation of judicial power of court – Whether s. 41B ultra vires arts. 4, 5, 8 and 121 of Federal Constitution – Whether applicant denied right to access to justice*

The applicants were charged before the Magistrate's Court for an offence under s. 39B of the Dangerous Drugs Act 1952 ('DDA'). An application for bail was made pursuant to s. 388 of the Criminal Procedure Code ('CPC') before the Magistrate. The application was premised on several issues, specifically: (i) the effect of the decision of the Federal Court in *Koh Chin Wah v. PP* that allowed an application for bail under s. 13 of the Security Offences (Special Measures) Act 2012 ('SOSMA'); (ii) on the authority of the decision of the Federal Court in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat* ('*Semenyih Jaya*'), s. 41B of the DDA amounted to an

usurpation of the judicial power of the court and was therefore *ultra vires* art. 121 of the Federal Constitution ('FC'); (iii) s. 41B of the DDA was *ultra vires* arts. 4, 5 and 8 of the FC, in that, offenders under the DDA are not treated equally under the law whereas offenders under different penal laws are allowed to apply for bail under s. 388(1) of the CPC; (iv) the effect of the High Court decision in *Puan Saad v. PP* ('*Puan Saad*') where an application for bail by an accused charged under s. 39B of the DDA was allowed; (v) in the event the court holds s. 41B of the DDA to be unconstitutional and/or agrees with the position taken in *Puan Saad*, s. 388(1) is available to the applicants; and (v) the court should consider the medical issues suffered by the applicants and additionally, the second applicant's gender. The application was opposed by the respondent based on, *inter alia*, the following contentions: (i) there was a presumption of the constitutionality of s. 41B of the DDA; (ii) the exercise and limits of judicial power to grant or not grant bail is derived from art. 121 of the FC and as provided by law; (iii) s. 41B of the DDA takes precedence over s. 388(1) of the CPC since the DDA is a specific law dealing with drug-related offences; and (iv) even if s. 388(1) of the CPC was applicable, the applicants did not satisfy the requirements for bail under that provision. The Magistrate denied the applicants' application and both applicants had since then been in remand. Dissatisfied with the decision of the Magistrate in denying bail, the applicants filed the application with a certificate of urgency. The certificate was premised on the matter of liberty of both the applicants.

Held (dismissing application):

(1) Although the court agreed that a full grounds judgment of the Federal Court declaring s. 13 of the SOSMA to be unconstitutional would have a direct bearing and impact on the consideration of the constitutionality of s. 41B of the DDA, until such time when such full grounds are available, the absence of such grounds did not possess any binding effect on this court. (para 19)

(2) The case of *Semenyih Jaya* was distinguishable on its facts and issues and had no application to the application at hand. In *Semenyih Jaya*, the challenge centred on the effect of s. 40D of the Land Acquisition Act 1960 where the power to decide on the compensation for compulsory land acquisition plainly rested, not with the judge, but with two assessors who sat with him. For that reason, that provision was struck down by the Federal Court. In the present application, there was no issue regarding the displacement of judicial power. Although s. 41B absolutely prohibited bail, yet s. 41B(1)(c) of the DDA still placed the power to grant bail with the judge in the absence of any certificate by the Public Prosecutor. Thus, the seat of judicial power remained with the judge *albeit* limited, unlike the impugned s. 40 of the Land Acquisition Act 1960. The court disagreed that s. 41B(1)(c) of the DDA supported the contention that the power to grant bail resided not with

the judge but the Public Prosecutor akin to the circumstances in *Semenyih Jaya.* Section 41B(1)(c) did not support the contention as the power to grant bail was not taken away and placed or shared with the Public Prosecutor. (paras 24-26)

(3) Section 41B of the DDA was a piece of legislation that was within the power of Parliament to legislate. Parliament may legislate matters that were necessary within the context of drug-related offences, including denial of bail. The power of the court to grant bail, on the other hand, was as determined by law. When the law is taken as validly and constitutionally passed, there is no question about the usurpation of the court's judicial power. The court merely exercises powers that is provided by the law and if that power is not granted, it could not be said that there was an usurpation of the judicial power of the court. On that basis, s. 41B of the DDA could not be said to be unconstitutional. (paras 34, 36 & 38)

(4) Parliament is competent to pass a law that is discriminatory. The test is whether the law is proportionate to the objective it seeks to achieve. Applying the reasonable classification test as adopted by the Federal Court in *Danaharta Urus Sdn Bhd*, taking into account the preamble of the DDA and the purpose of s. 41B of the DDA as reflected in the Hansard, that provision satisfied that test. It was not remote and misplaced to state that there could be the risk of flight of an accused and tampering of witnesses in cases involving the trafficking of drugs worth millions of Ringgit, organised drugs syndicates and death penalty. Whilst an accused is presumed innocent until proven guilty, there is a clear need to mitigate risks that any prosecution of an accused is squandered because of accused had absconded or witnesses refused to testify for fear of their safety. Section 41B of the DDA thus created a class of persons who were prohibited from accessing bail and the creation of that class of persons is proportionate to and justified taking into account the objective of that law. It is in the interest of the public to limit the rights of accused persons falling under s. 41B of the DDA to be granted. (paras 42-44)

(5) Section 41B of the DDA did not in any way curtail the applicant's right to access to justice. The applicants were presumed innocent until proven guilty, that was the cornerstone of criminal jurisprudence and administration of justice. Access to justice under art. 8(1) is a general right which could be fulfilled only by laws enacted conferring jurisdiction and powers on the courts under the specific authority contained in art. 121(1) of the FC. While art. 8(1) dealt with the right *per se*, art. 121(1) of the FC, on the other hand, conferred power on Parliament to set up an institutionalised mechanism with power and jurisdiction to determine the extent and manner in which that right should be exercised. Articles 8(1) and 121(1) of the FC were therefore

A not in conflict but complemented each other. Therefore, s. 41B of the DDA was not disproportionate to the objective that it sought to achieve and therefore, there was no infringement of arts. 4, 5 and 8 of the FC. (paras 45, 46, 48 & 54)

B **(6)** Section 41B was not unconstitutional just because it was not passed pursuant to art. 149 of the FC. Section 41B(2) of the FC made it clear that s. 41B(1) shall have effect notwithstanding any other written law or any rule of law to the contrary. Such was the intention of Parliament. Notwithstanding that the DDA was not classified as a legislation pertaining to any of the matters stated in art. 149 of the FC, in relation C to security matters yet the menace of drug trafficking and its destructive effect on society could not be denied in any measure. In limiting the liberty of an accused who comes within the ambit of s. 41B, the law seeks to mitigate the risks that such persons would continue to propagate the drug menace until he is proven guilty as charged or freed by a court D of law. (paras 48 & 49)

(7) The court did not agree that just because a piece of legislation was not proven to always achieve the mischief that it intended, the law must then be abandoned. Whilst an accused is presumed innocent until proven guilty, the mischief that s. 41B wished to achieve could not be frustrated E unless otherwise amended by law. The application could not be considered on the merits of the applicants' medical issues and gender under s. 388(1) of the CPC. (paras 58 & 59)

(8) The court declined to take the same position as taken by the High Court in the case of *Puan Saad*. That decision being made by a court of F co-ordinate jurisdiction to this court, was not binding on this court. (para 62)

Case(s) referred to:

Abdullah Atan v. PP & Other Appeals [2020] 9 CLJ 151 FC ***(foll)***
Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(refd)***
G *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC* ***(foll)***
Datuk Tan Leng Teck v. Sarjana Sdn Bhd & Ors [1997] 3 CLJ 421 HC ***(refd)***
Kanagasingam Anantham v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 7 CLJ 600 CA ***(refd)***
Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors & Other Appeals [1997] 4 CLJ 253 CA ***(refd)***
H *Koh Chin Wah lwn. PP (No Rayuan Jenayah: 07-13-11-2019(W)) (Unreported)* ***(not foll)***
Koh Chin Wah v. PP [2019] 1 LNS 1178 HC ***(refd)***
Letitia Bosman v. PP & Other Appeals [2020] 8 CLJ 147 FC ***(refd)***
Loy Chin Hei v. PP [1981] CLJ 177; [1981] CLJ (Rep) 178 HC ***(refd)***
Malaysian Motor Insurance Pool v. Tirumeniyar Singara Veloo [2019] 10 CLJ 731 FC ***(refd)***
I *Ooi Kean Thong & Anor v. PP [2006] 2 CLJ 701 FC* ***(refd)***
PP v. Chan Cheng Sim [1993] 3 CLJ 661 HC ***(refd)***
PP v. Chew Siew Luan [1982] CLJ 354; [1982] CLJ (Rep) 285 FC ***(foll)***
PP v. Datuk Harun Hj Idris & Ors [1976] 1 LNS 180 HC ***(refd)***

PP v. Khong Teng Khen & Anor [1976] 1 LNS 100 FC ***(refd)***
PP v. Leong Ying Ming [1993] 2 CLJ 143 SC ***(refd)***
Puan Saad v. PP [2021] 1 CLJ 121 HC ***(not foll)***
Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors And Other Appeals [2021] 4 CLJ 1 FC ***(refd)***
Saminathan Ganesan v. PP [2020] 3 CLJ 398 HC ***(foll)***
Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(dist)***
Shri Ram Krishna Dalmia & Ors v. Shri Justice Tendolkar & Ors AIR 1958 SC 528 ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2021] 3 CLJ 507 FC ***(refd)***
Suresh Kumar Velayuthan v. PP [2020] 4 CLJ 270 HC ***(foll)***
Tia Ah Leng v. PP [2004] 4 CLJ 77 CA ***(refd)***
Vishnu Telagan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 9 CLJ 177 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 388(1)
Dangerous Drugs Act 1952, ss. 39B, 41B(1)(c), (2)
Federal Constitution, arts. 4, 5, 8(1), 9, 10, 13, 74, 121, 149
Land Acquisition Act 1960, s. 40D
Penal Code, s. 302
Pengurusan Danaharta Nasional Berhad Act 1998, s. 72
Prevention of Crime Act 1959, s. 15B
Security Offences (Special Measures) Act 2012, s. 13

For the applicants - N Sivananthan & Nabila Habib; M/s Sivananthan
For the respondent - Khairul Anuar Abdul Halim, Noor Azura Zulkifle & Yazid Mustaqim Roslan; DPPs

Reported by Lina E

JUDGMENT

Mohd Radzi Abdul Hamid JC:

Matter Before This Court

[1] This is an application by way of a notice of motion by both the applicants for a bail pursuant to s. 388(1) of the Criminal Procedure Code ("CPC") ("application").

Background

[2] On 8 December 2020 both the applicants were charged before the Magistrate's Court at Georgetown, Penang for an offence under s. 39B of the Dangerous Drugs Act 1952 ("DDA"). An application for bail was made before the Magistrate and that application was denied. Since then, both applicants have been in remand at the Remand Prison, Penang dan Pokok Sena Prison, Kedah respectively.

[3] Dissatisfied with the decision of the Magistrate in denying bail, both applicants filed the application with a certificate of urgency. The certificate was premised on the matter of liberty of both the applicants. The application was then heard on 16 April 2021.

The Application

[4] The application was supported by affidavit of Nurul Binti Nabilah binti Habibu, legal counsel for both the applicants ("applicant's affidavit").

[5] The respondent filed a total of 13 affidavits in reply to the application ("affidavits in reply").

[6] The application is premised on several issues. They are summarised as follows:

(i) the effect of the decision of Federal Court in *Koh Chin Wah lwn. PP* (No. Rayuan Jenayah: 07-13-11-2019(W)) that allowed an application for bail under s. 13 of the Security Offences (Special Measures) Act 2012 ("SOSMA");

(ii) that on the authority of the Federal Court decision *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526 s. 41B of the Dangerous Drugs Act 1952 amounts to a usurpation of the judicial power of the court and is therefore *ultra vires* art. 121 of the Federal Constitution;

(iii) that s. 41B of the DDA is *ultra vires* arts. 4, 5 and 8 of the Federal Constitution in that offenders under the DDA are not treated equally under the law whereas offenders under different penal law are allowed to apply for bail under s. 388(1) of the CPC;

(iv) the effect of the High Court decision in *Puan Saad v. PP* [2021] 1 CLJ 121 where the court in that case had allowed an application for bail by an accused charged under s. 39B of the DDA; and

(v) that in the event this court holds s. 41B of the DDA to be unconstitutional and/or agrees with the position taken in *Puan Saad* (*supra*) then s. 388(1) of the CPC is available to both the applicants. This court should therefore consider this applicant on its merits. In consideration of the medical issues suffered by both applicants and additionally, the second applicant's gender, bail should be granted.

[7] The application is opposed by the respondent based, *inter alia*, on the following contentions:

(i) that there is a presumption of the constitutionality of s. 41B of the DDA;

(ii) that the exercise and limits of judicial power to grant or not grant bail are derived from art. 121 of the Federal Constitution and as provided by law;

(iii) that s. 41B of the DDA takes precedence over s. 388(1) of the CPC since the DDA is a specific law dealing with drug-related offences; and

(iv) that even if s. 388(1) of the CPC is applicable, both the applicants do not satisfy the requirements for bail under that provision.

Deliberations By This Court

Prohibition Against Bail Under The DDA – Background

[8] Section 41B of the DDA provides:

> (1) Bail shall not be granted to an accused person charged with an offence under this Act:
>
> (a) where the offence is punishable with death; or
>
> (b) where the offence is punishable with imprisonment for more than five years; or
>
> (c) where the offence is punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person.
>
> (2) Subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary.

[9] This provision of the DDA came into effect on 10 March 1978 *via* the Dangerous Drugs (Amendment) Act 1978. It is plainly clear that s. 41B of the DDA strictly prohibits the granting of bail for all the type of offences listed therein. Back in 1982, the Federal Court had the occasion to express its views on s. 41B. It was held in *PP v. Chew Siew Luan* [1982] CLJ 354; [1982] CLJ (Rep) 285; [1982] 2 MLJ 119 that the DDA is a special law passed by Parliament that deals with drug-related offences and in derogation of the rights of an accused to be granted bail. It being a specific law, s. 41B regarding bail must therefore be applied in preference to any general law, in particular s. 388(1) of the CPC. In delivering the decision of the court, Raja Azlan Shah CJ held:

> The Dangerous Drugs Act 1952 (Revised-1980) is an Act specifically designed to regulate the importation, exportation, manufacture, sale and use of, *inter alia*, dangerous drugs, and "to make special provisions relating to the jurisdiction of courts in respect of offences thereunder and their trial, and for purposes connected therewith". In other words, the Act is in substance a special law passed by Parliament in derogation of the rights of a person concerning the granting of bail in an otherwise ordinary case. We further note in particular that s. 41B of the Act is an entirely new section introduced by the Dangerous Drugs (Amendment) Act, 1978 (Act A426) and became operative on 10.3.78. *Generalibus specialia derogant* is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law. (See also *Public Prosecutor v. Chu*

Beow Hin [1982] 1 MLJ 135 137). The provisions of s. 3 of the Criminal Procedure Code which counsel for the respondent seeks to rely on has no relevance whatsoever to the matter in issue before us.

It would be erroneous to apply expressions used and provisions made in one statute to another and entirely different one in complete disregard of the latter's express stipulations in the light of its specific purpose and object. On the other hand, it is a sound, and, indeed, a well-known principle of construction of a statute that the purport of words and expressions used in a legislative measure must take their colour from the context in which they appear. We do not therefore agree with the learned judge that it is open to a court to subject the express provisions regarding bail in s. 41B of the Dangerous Drugs Act to the provisions relating thereto in the Criminal Procedure Code. The provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must ex necessitate yield to the specific provisions of s. 41B of the Dangerous Drugs Act in that regard.

[10] Later, the Supreme Court in *PP v. Leong Ying Ming* [1993] 2 CLJ 143 similarly held that the prohibition against bail under s. 41B of the DDA is an absolute one. In *PP v. Chan Cheng Sim* [1993] 3 CLJ 661; [1993] MLJU 259 Abdul Malik Ishak JC (as he then was) held:

Since the offence he has been charged with under the Act is punishable with death, then it falls within the provisions of s. 41B(a) of the Act that bail shall not be granted to an accused person charged with an offence under the Act where the offence is punishable with death.

In *Yap Sooi Kim v. Public Prosecutor* [1989] 2 CLJ 688, Anuar J dismissed the application for bail under s. 41B(1)(b) of the Act and was of the view that the words "punishable with imprisonment" refer to the power of punishment which the court has under the law and not the punishment which the court may choose to impose. In *Leong Ying Ming v. PP* [1990] 2 MLJ 359, Lamin J had to consider whether an offence under s. 39A(2) of the Act was a bailable offence. His Lordship held that that section did not come under s. 41B(1)(b) of the Act and accordingly granted bail to the Accused in the sum of RM10,000 in two sureties. On appeal to the Supreme Court by the *Public Prosecutor* [1993] 1 AMR 11 pg. 399 SC, Gunn Chit Tuan SCJ (now CJ Malaya) applied *Public Prosecutor v. Siew Luan* [1982] CLJ 285 (Rep) and held that the provisions regulating the granting of bail under specific Act like the Dangerous Drugs Act must be construed in the context of the Dangerous Drugs Act and not under the provisions of the CPC. Therefore, the general provisions of the CPC must yield to the specific provisions of s. 41B of the Act. It was further held that the learned Judge should not have granted bail in this case.

The nett result of these judgments would show that bail should not be granted for cases under the Act where the provisions of s. 41B of the Act are brought into play. The restriction on bail under s. 41B of the Act is

absolute and neither the court below nor the High Court has power to admit to bail any person charged with an offence punishable with death or more than '5 years' imprisonment or even for lesser terms when the Public Prosecutor certifies in writing that it is against the public interest to allow bail. By employing clear and unambiguous words in s. 41B of the Act, the Legislature has tied the hands of the courts, and the courts must vigorously give effect to it.

[11] The decision of the Federal Court in *Chew Siew Luan* was referred to in the recent Federal Court decision in *Abdullah Atan v. PP & Other Appeals* [2020] 9 CLJ 151; [2020] 6 MLJ 727 where the Federal Court similarly echoed the application of the principle of *generalia specialibus non derogant* to state that the CPC being one of a general law must give way to the provisions of a specific law that is, the Dangerous Drugs Act 1952. Her Ladyship Chief Justice Tengku Maimun in delivering the decision of the court stated:

[52] The presumptions in s. 37(a) to (j) of the DDA have been in place since the promulgation of the Dangerous Drugs Ordinance 1952. The presumption of trafficking in s. 37(da) of the DDA was inserted in 1997. These statutory presumptions long pre-date the insertion of s. 180(4) of the CPC in 2006. Therefore, when s. 180(4) of the CPC was introduced, Parliament is presumed to be aware of the existing law and of the specific manner and method in which trafficking cases are proved ie, on a presumption basis upon a finding of fact of possession. Had Parliament intended the drastic consequence of effectively repealing a long-established statutory provision, one would expect Parliament to have said so in clear terms (see *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751 at para. [34] (CLJ); para. [33] (MLJ)).

[53] Furthermore, the DDA is a specific Act relating to and dealing with trials in respect of dangerous drugs. The CPC, on the other hand, is a law of general application. Where there is a conflict between a specific law and a general law, the conflict may be resolved in one of two ways. The first is via the maxim *generalia specialibus non derogant*. The second is the doctrine of harmonious construction.

[54] The former Federal Court had the occasion to consider the operation of the CPC and the DDA in *PP v. Chew Siew Luan* [1982] CLJ 354; [1982] CLJ (Rep) 285; [1982] 2 MLJ 119. In *Chew Siew Luan* (*supra*), the question was whether the provisions relating to bail in the CPC were applicable to a trafficking charge preferred under the DDA. The Federal Court unanimously held that the provisions of the DDA will apply to the exclusion of the CPC.

[12] The Federal Court decision in *Abdullah Atan* (*supra*) effectively affirmed the decision in *Chew Siew Luan* on the position of the DDA as being a specific law that deals with drug-related offences. Against this background, this court will deliberate on the issues raised by the applicants.

A *Decision in Koh Chin Wah v. PP*

[13] The applicant in that case had initially applied for bail at the High Court under s. 388(1) of the CPC on the basis that the type of offence that he was charged for was not a security offence. Therefore, s. 13 of the SOSMA on the prohibition of bail did not apply to him. There was no argument raised
B on the constitutionality of s. 13 of the SOSMA (*Koh Chin Wah v. PP* [2019] 1 LNS 1178; [2019] MLJU 812). The court held that the offence constituted a security offence and s. 13 of the SOSMA was applicable to the applicant instead of s. 388(1) of the CPC. Since the applicant did not fall within any of the categories of persons entitled to bail under s. 13, bail was not granted.

C **[14]** The applicant then sought to secure bail before the Federal Court. The application was heard on 22 December 2020 and based on the copy of the order exhibited as "NN-2" in the applicant's affidavit, the court granted bail to the applicant pursuant to s. 388(1) of the CPC. Learned counsel for the applicants sought to argue that the issue of constitutionality of s. 13 of
D SOSMA was presented to the Federal Court and on that basis the Federal Court had granted bail to the applicant under s. 388(1) of the CPC. Since s. 13 of SOSMA was held unconstitutional then this court must also adopt the same position that s. 41B of the DDA is equally unconstitutional thus opening the door for the application of s. 388(1) of the CPC. Applying the
E principle of *stare decisis* this court is bound to follow the decision of the Federal Court.

[15] Unfortunately, there are no grounds of judgment prepared by the Federal Court to which this court can refer for guidance on the basis for granting of bail despite the express provision of s. 13 of SOSMA. The *ratio*
F *decidendi* of that case is not available and hence there is no material for this court to deliberate on the arguments and considerations of the Federal Court in arriving at its decision.

[16] In any case, it must be stressed that the order of the Federal Court
G dated 22 December 2020 did not make any pronouncement on the constitutionality of s. 13 of the SOSMA. Hence, this court cannot agree that such was the decision of the Federal Court. In absence of the written grounds of judgment of the court, this court cannot speculate on what were the deliberation of law and facts by the Federal Court and to what extent, if any, such matter applies to or is distinguishable from or directly relevant to the
H matter before this court.

[17] It is an established law regarding the principle of *stare decisis* that one of the exceptions to the principle is the absence of the full reasoning and argument of the decision of the superior court. In that situation, a subordinate
I court is not bound by that decision.

[18] The principle of *stare decisis* and its exceptions have been discussed in many decisions including *Malaysian Motor Insurance Pool v. Tirumeniyar Singara Veloo* [2019] 10 CLJ 731; [2020] 1 MLJ 440, FC; *Vishnu Telagan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 9 CLJ 177; [2019] 6 MLJ 1, FC; and *Datuk Tan Leng Teck v. Sarjana Sdn Bhd & Ors* [1997] 3 CLJ 421; [1997] 4 MLJ 329. In *Kanagasingam Anantham v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 7 CLJ 600; [2019] 4 MLJ 103, the Court of Appeal held:

> The appellant heavily relied on the case of *Abdul Wahid*, because the issue raised is related to s. 5(4) of the SPM Act which is relevant and similar as the issue raised in the present case. The appellant urged upon us to follow this case because according to him the case was on appeal by the senior federal counsel for the respondents to the Federal Court and the appeal was dismissed on 16 August 2018. The appellant did not produce the written grounds from the Federal Court. Although the appellant produced the order of the Federal Court dated 16 August 2018, and tried to convince us that there was only one issue raised, *ie*, delay under s. 5 of the SPM Act, it was our view that without the written grounds, we would not be able to know whether the appeal was dismissed on the said issue raised. We cannot speculate whether the decision was based on delay issue or it could be based on some other reasons. We cannot agree with the appellant that we are bound by the decision of the Federal Court in *Abdul Wahid*'s case.

[19] Although this court agrees that a full grounds of judgment of the Federal Court declaring s. 13 of the SOSMA to be unconstitutional would have a direct bearing and impact on the consideration of the constitutionality of s. 41B of the DDA, until such time when such full grounds are available, the absence of such grounds as stated earlier renders the order dated 22 December 2020 not possessing any binding effect on this court.

[20] On that basis, this court holds that it is not bound by the decision in *Koh Chin Wah* (*supra*) and that the decision cannot serve to bind this court in declaring that s. 41B of the DDA is unconstitutional.

Constitutionality Of Section 41B Of The DDA

[21] Since this court holds that it is not bound by the Federal Court decision in *Koh Chin Wah* (*supra*), the next question to be answered is whether this court can find that s. 41B of the DDA is unconstitutional having regard to the provisions of the Federal Constitution.

[22] In considering the challenge to the constitutionality of a piece of legislation, a court must be guided by the principles as described by Abdoolcader J (as he then was) in *PP v. Datuk Harun Hj Idris & Ors* [1976] 1 LNS 180; [1976] 2 MLJ 116:

> 2. Principles in considering the challenge to the constitutional validity of the impugned section.

A In considering the matter in issue the principles to be borne in mind are three-fold:

> Firstly, there is a presumption – perhaps even a strong presumption – of the constitutional validity of the impugned section with the burden of proof on whoever alleges otherwise.
>
> B Secondly, the presumption is not however to be carried to the extent or stretched for the purpose of validating an otherwise invalid law ...
>
> And thirdly, for this purpose a statute or statutory provision must be examined on its own merits and not by comparison with other
> C similar provisions ...

On The Issue Of Usurpation Of Powers

[23] Learned counsel for the applicants contended that the legislature through s. 41B of the DDA had effectively removed the judicial power of the
D court to grant bail. That constituted a usurpation of the powers of the court as provided under art. 121 of the Federal Constitution to exercise its judicial power and discretion to grant bail. To support his contention, learned counsel relied on the decision of the Federal Court decision in *Semenyih Jaya* (*supra*) where it was held that any limitation or deprivation of the exercise
E of judicial power amounts to the usurpation of judicial power as conferred by the Federal Constitution. Learned counsel for the applicants then ventured to persuade this court to take a similar approach as taken by the court in *Saminathan Ganesan v. PP* [2020] 3 CLJ 398; [2020] 7 MLJ 681 where the decision in *Semenyih Jaya* (*supra*) weighed heavily in the court's decision to find that s. 13 of the SOSMA that prohibits bail unconstitutional.

F **[24]** On the issue of whether s. 41B of the DDA had usurped the judicial power of the Judiciary in the granting of bail in light of the decision of *Semenyih Jaya* (*supra*), this court holds the view that the case of *Semenyih Jaya* (*supra*) is distinguishable on its facts and issues and has no application to the
G application at hand. In *Semenyih Jaya* (*supra*) the challenge centred on the effect of s. 40D of the Land Acquisition Act 1960 where the power to decide on the compensation for compulsory land acquisition plainly rested not with the judge but with two assessors who sat with him. For that reason, that provision was struck down by the Federal Court. In the present application, there is no issue regarding the displacement of judicial power. Although
H s. 41B absolutely prohibits bail yet s. 41B(1)(c) of the DDA still places the power to grant bail with the judge in the absence of any certificate by the Public Prosecutor. Thus, the seat of judicial power remains with the judge *albeit* limited, unlike the impugned s. 40D of the Land Acquisition Act 1960.

I **[25]** Continuing therefrom, this court disagrees with learned counsel for the applicants that s. 41B(1)(c) supports the contention that the power to grant bail resides not with the judge but the Public Prosecutor akin to the circumstances in *Semenyih Jaya* (*supra*). Section 41B(1)(c) of the DDA provides:

(1) Bail shall not be granted to an accused person charged with an offence under this Act:

(a) ...

(b) ...

(c) where the offence is punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person.

[26] In this court's view s. 41B(1)(c) does not support that contention as the power to grant bail is not taken away and placed or shared with the Public Prosecutor. As stated earlier, although s. 41B absolutely prohibits bail yet s. 41B(1)(c) still places the power to grant bail with the judge in the absence of any certificate by the Public Prosecutor. Judicial power remains with the judge *albeit* limited and not with the Public Prosecutor.

[27] It would be instructive at this juncture, to refer to the Federal Court decision in *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147; [2020] 5 MLJ 277 where in arriving at its decision on the issue of the judicial powers of the courts and the constitutionality of the mandatory death sentence under s. 39B of the DDA and s. 302 of the Penal Code, the court had distinguished *Semenyih Jaya* (*supra*) on its facts. It would be pertinent to refer to what was stated by His Lordship Azhar Mohamed FCJ in *Letitia Bosman* (*supra*):

[61] As to the Federal Court decision of *Semenyih Jaya* that was relied heavily by counsel, he contended that the removal of the discretion to determine life and death for the punishment of the offence of drug trafficking amounts to an interference of the judicial function. I do not see any merit at all in this argument. Clearly, the decision in *Semenyih Jaya* is distinguishable. That case concerned how much compensation had to be paid to the landowner arising from an acquisition of its land. It is important to note that the Federal Court in *Semenyih Jaya* in dealing with the concept of the judicial power under the FC, struck down s. 40D of the Land Acquisition Act 1960 because it provided for the final decision on compensation for compulsory land acquisition to be determined not by the judge, but by the two assessors sitting with him in the High Court. In that case it offends the doctrine of separation of power since the assessors decided on the determination of the compensation of the land acquisition and not the judge. This clearly is not the matter in the present case. In our case the impugned provisions are not legislative usurpation of the judicial power. On the contrary, as seen earlier at [58], prescribing measure of punishment is the prerogative of Parliament. This must be distinguished from the court's power to impose sentence, which is the province of the courts as can be seen in s. 183 of the CPC that provides if the accused is convicted, the court shall pass sentence according to law. No judicial punishment can take place unless the person to be punished has been found guilty and convicted by the court. Unlike the facts in

A *Semenyih Jaya*, the exercising of judicial power by virtue of the impugned provisions is still with the court. The power to impose death penalty is given to the court and no other alien body. For that reason, clearly the case of *Semenyih Jaya* does not advance the appellants' case very far.

[28] Proceeding therefrom, in this court's view the question of whether B there has been a legislative usurpation of judicial power under s. 41B of the DDA, must be answered in the context of the power of Parliament to legislate the DDA under art. 74 of the Federal Constitution. Since Parliament is empowered to legislate the DDA, then Parliament must also have the power to legislate not only the offences and consequential C punishments but also matters related to the conduct of trials. As provided by the preamble to the DDA (the relevance of the preamble will be discussed further later):

> An Act to make further and better provision for the regulating of the importation, exportation, manufacture, sale, and use of opium and of D certain other dangerous drugs and substances, **to make special provision relating to the jurisdiction of courts in respect of offences thereunder and their trial, and for purposes connected therewith**.
>
> (emphasis added)

[29] In this court's view, the words "... to make special provision relating E to the jurisdiction of the courts in respect of offences and their trial, and for the purposes connected therewith" must mean to include the power to limit the judicial power of the court with respect to bail through the special provision of s. 41B.

[30] In *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors* F *& Other Appeals* [1997] 4 CLJ 253; [1997] 3 MLJ 23 the Court of Appeal held:

> It is also well-settled that the phrase "with respect to" appearing in art. 74(1) and (2) of the Federal Constitution – the provision conferring legislative power upon the Federal and State Governments respectively – G is an expression of wide import. As observed by Latham CJ in *Bank of New South Wales v. The Commonwealth* [1948] 76 CLR 1, 186, in relation to the identical phrase appearing in s. 51 of the Australian Constitution which confers Federal legislative authority:
>
> > A power to make laws 'with respect to' a specific subject is as wide H a legislative power as can be created. No form of words has been suggested which would give a wider power.
>
> The power conferred upon a Parliament by such words in an Imperial statute is plenary – as wide as that of the Imperial Parliament itself: *R. v. Burah* [1878] 3 App. Cas. 889; *Hodge v. The Queen* [1883] 9 App Cas 117. But the power is plenary only with respect to the specified subject. I

[31] Relevant thereto and referring again to His Lordship Azhar Mohamed FCJ in *Letitia Bosman* (*supra*): A

> [49] Evidently, Parliament derives its legislative power from the FC. The power to legislate is a plenary power vested in Parliament. The issue of legislative competency is to be decided by reference to matters falling within Parliament's power to legislate. What is important in the setting of the present appeals is that the constitutional scheme of the FC empowers Parliament, the legislative branch of the Government to make laws with respect to any of the matters enumerated in cl. (1) art. 74 of the FC and the Federal List as set out in the Ninth Schedule. The constitutional provisions highlight the fundamental principle relating to the power of Parliament to make law in respect of a particular matter pursuant to the FC. In this regard, item 4 of the Federal List provides for "civil and criminal law", including in para. (h) "creation of offences in respect of any of the matters included in the Federal List or dealt with by Federal law". B C
>
> [50] An important point to note is that the words "with respect to" in art. 74 must be interpreted with extensive amplitude. The cardinal rule of interpretation is that the entries in the legislative lists are not to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. The widest possible construction, according to the ordinary meaning of the words in the entry, must be put upon them. In construing the words in a constitutional document conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in widest amplitude. (See: *Raja Jagannath Baksh Singh v. The State of Uttar Pradesh* [1962] AIR 1563, *The State Of Rajasthan v. Shri G Chawla And Dr Pohumal* [1959] AIR 544 and *Elel Hotels And Investments Ltd v. Union Of India* 1990 AIR 1664). D E F

[32] Further, there is a presumption and that presumption applies here that since Parliament had the power to legislate s. 41B of the DDA, it is therefore a constitutional piece of legislation. As expressed by the Federal Court in *Ooi Kean Thong & Anor v. PP* [2006] 2 CLJ 701; [2006] 3 MLJ 389: G

> [16] In the area of public law and in particular administrative law there are judicial pronouncements, local and foreign, which provide for the grounds to rely upon in relation to judicial control of subsidiary legislation. One such ground is whether the parent act or the subsidiary legislation is constitutional or in conformity with the provisions of the Constitution. If it infringes the Constitution itself or any constitutional provision then it is struck down for that reason. But it has to be borne in mind that the courts have been consistently applying the presumption of constitutionality in favour of impugned statutory provisions and to succeed the onus is therefore on the party asserting otherwise to show. (See: *Public Prosecutor v. Pung Chen Choon* [1994] 1 LNS 208; [1994] 1 MLJ 566; *Public Prosecutor v. Su Liang Yu* [1976] 1 LNS 113; [1976] 2 MLJ 128). H I

[33] The issue of presumption of constitutionality was also discussed by the Federal Court in *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701; [2004] 2 MLJ 257. Augustine Paul JCA speaking for the Federal Court quoted with approval the Indian Supreme Court decision of *Shri Ram Krishna Dalmia & Ors v. Shri Justice Tendolkar & Ors* AIR 1958 SC 528:

> SR Das CJ also listed some guidelines that must be borne in mind by the court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws. They are:
>
> 1. A law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself.
> 2. There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.
> 3. It must be presumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.
> 4. The legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.
> 5. In order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.
> 6. While good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

[34] Applying those principles, this court holds the view that s. 41B of the DDA is a piece of legislation that is within the power of Parliament to legislate. Parliament may legislate matters that are necessary within the context of drug-related offences including denial of bail. The issue of drug abuse and trafficking is abhorred by society and equally reflected in the many court decisions. As held by the Court of Appeal decision of *Tia Ah Leng v. PP* [2004] 4 CLJ 77; [2004] 4 MLJ 249:

> 9. It is true that the general rule is, when imposing a sentence, the court should take into consideration the fact that an accused person who has pleaded guilty be given certain credit and discount, but we are of the view that there are exceptions to this rule. In our opinion, one of these are the offences under the Dangerous Drugs Act 1952. The Government and the legislature have taken very serious views in the abuse of usage of dangerous drugs. Drug addictions are rampant and the Government as well as the legislature have tried to curb these addictions especially amongst youths but met with little success. Death sentences and heavy penalties have been introduced but we find drug addicts everywhere. The addiction to drugs have led to other offences such as thefts, burglary and snatch thefts. Some of these offences lead to serious consequences. We have read in the newspapers that some drug addicts have gone to the extent of hurting their own families such as their mothers, sisters and grandmothers in order to get some money to purchase the drugs to support their addictions. Recently, a woman died when a snatcher snatched her handbag and she was dragged together with the handbag some distance away and as a result of that she died.
>
> 10. In our view, the source of all these evils are the drug traffickers and the drug peddlers. They are the ones who have been trafficking, selling and peddling the drugs to those drug addicts. It is public knowledge that the return in this type of business is very lucrative.

[35] The prerogative of Parliament to enact laws that relate to drugs offences and the objectives that it desires to achieve notwithstanding how harsh it may seem to be, must be therefore be respected by the courts. Quoting again from His Lordship Azhar Mohamed in *Letitia Bosman* (*supra*):

> [103] A significant event took place in 2017. In December of that year, the Dangerous Drugs (Amendment) 2017 Act was passed by Parliament. This is a new legislative framework on the mandatory death sentence introduced by Parliament. This partially abolished the death penalty as a mandatory punishment for drug trafficking. By this new initiative, in drug trafficking offences, courts can now exercise a limited amount of discretion in sentencing in the presence of specific circumstances, namely, the limited involvement of the accused in the illicit activity and the accused's substantial contribution to disrupting drug trafficking. These are signs of a shift in the legislative policy of Parliament. This is an incremental policy change by Parliament as regards the mandatory death sentence. But the most important point to note, however, is this: the amended s. 39B *vide* the Dangerous Drugs (Amendment) 2017 still mandatorily prescribes the death sentence ... As far as the Legislature's current policy is concerned, the seriousness of trafficking of drug cases that caused harm to society is the same today as it was 40 years ago when the mandatory death sentence was introduced by Parliament. This has largely remained constant as far as the policy of Parliament is concerned in dealing with drug trafficking. So far, it appears, there has basically not been enough parliamentary backing for the abolition of the mandatory

A death sentence. The reasons why this is so are wholly immaterial for our purpose. But there is nothing to suggest that the policy of Parliament will not be subject to change in the future. One can conceive of a situation that eventually Parliament will abolish the mandatory death penalty.

[104] It is against the above background, I come to the conclusion that in B the context of the Malaysian society, Parliament as the duly elected Legislature is the appropriate body to decide the appropriate measure of punishment for drug traffickers and murderers for what society regards as the most serious crimes. It is a controversial matter of policy involving differing views on the moral and social issues involved which by its nature is more suitable for determination by Parliament than by the courts. If a C judge were to decide that the mandatory death penalty is not proportionate, it would entail the judge enacting his or her personal views of what is just and desirable into legislation ...

[105] Undeniably, there are always important elements of social policy and moral value judgment involved in prescribing punishment for a particular D criminal offence. This is really what concerns us in the present appeals. In the context of our case, the issue pertaining to the mandatory death sentence is sensitive to the people's most fundamental collective moral and social values. This gives rise to a fundamental question: whether it is inherently and essentially a legislative matter for determination by the elected Legislature rather than the court? Does it by its nature require a E democratic mandate? In my opinion, the courts should leave the matter to Parliament to decide whether in the light of societal value and conditions to do away with the mandatory death sentence. As observed by Lord Hope in *AXA General Insurance Ltd v. The Lord Advocate & Others* [2011] UKSC 46, at para. 49, "While the judges, who are not elected, are best placed to protect the rights of the individual, including those who are F ignored or despised by the majority, the elected members of a Legislature of this kind are best placed to judge what is in the country's best interests as a whole".

[106] The point I am making is that in cases such as the present case, the social and moral features of the issue make Parliament the proper organ G of the Government for deciding it rather than the courts ...

[113] We cherish the doctrine of separation of powers. All three branches of the Government must respect each other's jurisdiction. The Judiciary must respect the prerogatives of Parliament. Judicial decision, which undermines Parliament's lawful authority, would turn the rule of law on its head. The courts have the duty to uphold the FC.

H

[36] As such, the power of the court to grant bail is as determined by law. When the law is taken as validly and constitutionally passed, there is no question about the usurpation of the court's judicial power. A court merely exercises the power that has been conferred by the law. In *Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors And Other Appeals* [2021] I 4 CLJ 1; [2021] MLJU 195, the Federal Court was presented with the question whether s. 15B of the Prevention of Crime Act 1959 ("POCA") in

ousting the power of the court to perform judicial review was unconstitutional. In answering in the negative, the court held, *inter alia*, that the purpose of the impugned law must be taken into account and the power of Parliament to legislate that law must be respected:

> [75] Coming back to the purpose and the policy of POCA, as can be discerned from the Hansard, it is to address the worrying rise in the crime index, particularly in organised crimes or crimes by a substantial body of persons (refer to paras. 27 and 28 of this judgment), which posed an adverse effect on the economy of the country. Those were the surrounding circumstances brought to the notice of the court in which the legislation was based and those were the facts which could be conceived existing at the time of legislation. These are reasonable grounds and the appellants have not shown how is POCA or the exercise of the power under it, is arbitrary and unsupportable.
>
> [76] In addition, when deciding on constitutional issues, the context in which such issues arise may make it appropriate for the courts to give particular weight to the views and policies adopted by the Legislature (*Lau Cheong v. HKSAR* [2002] 2 HKLRD 612). There may be conflicting decisions to be made by the Executive and the Legislature between the rights of the individual and the demands of society. There may be areas of judgment where the courts will defer on democratic basis, to the considered views of the elected body or persons whose decision is said to be compatible with the needs of society. Thus, a balance must be struck between the needs of the individual and society and "an inflexible standards must not be imposed on the Legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crimes. It must be remembered that questions of policy remain primarily the responsibility of the Legislature." (*Attorney General v. Lee Kwong Kut* [1993] AC 951).
>
> [77] Hence distilling from the above authorities, the rationale for the presumption of constitutionality is because Parliament is in a better situation to decide on social policy matters rather than the courts. Parliament represents the will of a democratically elected majority, hence their decision ought to be accepted as legitimate. The courts, which are not elected from the will of the population, are in no position to determine on policy matters, are tasked with resolving of disputes independent from the influence of the media, popular public opinion or pressure groups in the analysis and application of legal rules and principles and interpretation of legal texts.

[37] In discussing the effect of s. 15B of POCA on the function and power of the court, Her Ladyship Zabariah Mohd Yusof FCJ speaking for the majority stated, *inter alia*, that the courts function in accordance with the powers granted by law:

> (7) The impugned law was constitutional as art. 149 (to be read with art. 151(3)), authorised it. The task of the courts, as provided in art. 121(1), is to give full effect to what is provided by Federal law, in this case, s. 15B of the POCA which allowed for limited judicial review. Hence,

premised on the aforesaid, it could not be said that by limiting the courts' power in s. 15B of POCA, the Legislature/Parliament had encroached on the jurisdiction of the courts. It is the Legislature/Parliament that confer the court that jurisdiction and power. As such, there was no usurpation of judicial powers by the Legislature. The courts exercise its powers as provided by the POCA, a Federal law, which is precisely what art. 121(1) of the FC provides. Section 15B which limits judicial review by the courts only on procedural non-compliance was thus not unconstitutional by virtue of art. 4(1) of the FC (paras 97, 98 & 101)

(8) The court's function as a court of law is to decide cases that come before it in accordance with Federal law, which is enforced at the material time. In this respect, art. 121(1) of the FC is clear, in that it provides that courts are established by law (including the FC) and court's jurisdiction and the source of powers are derived from Federal law. 'Federal law' is defined by art. 160(2) to mean any Act of Parliament. Courts *vis-a-vis* judges do not derive their power in a vacuum and neither could they create jurisdiction for themselves. This was for Parliament to decide via the passing of Federal law when art. 121(1) states that '... and the High Courts and inferior courts shall have jurisdiction and powers as may be conferred by or under Federal law'. Parliament has the Legislative power to enact Federal law in relation to preventive detention under art. 149. Section 15B of the POCA is Federal law, and that is where the courts derived its power in judicial review under the POCA. This was premised on art. 121(1). The courts' duty is to interpret what is provided in s. 15B of the POCA. Hence, it was incorrect to state that s. 15B was an attempt by Parliament to suppress constitutional powers given to the courts as provided under art. 121(1). The exercise of judicial power does not begin until and unless the court is called upon to do so. Therefore, the substratum of laws must first exist before judicial authority comes into being. Such power exists because Parliament enact it to be so. (paras 121 & 122)

...

By limiting judicial review to procedural non-compliance by virtue of s. 15B of the POCA, Parliament did not encroach onto the judicial powers of the court as it was within their power to do so. The court in exercising such powers act according to what is prescribed and limited by the POCA, a Federal law. Section 15B was thus not inconsistent with art. 121(1) of the FC. Therefore, the ouster clause as in s. 15B of POCA does not suppress constitutional powers given to the courts as provided under art. 121(1) of the FC. Neither did it encroach on judicial powers thus breaching the doctrine of the separation of powers between the three branches, namely the Executive, Legislative and the Judiciary. In any event, it could not be said that s. 15B of the POCA was unconstitutional because it breached the doctrine of separation of powers, (paras 133, 134 & 136)

[38] Thus, drawing from the decision of the Federal Court in *Rovin Joty* (*supra*) this court is of the view that as stated by the Federal Court in *Chew Siew Luan* (*supra*) the DDA is a specific law that deals with drug-related

offences and Parliament is competent to set the jurisdiction of the courts or limits thereto in respect of matters relating to the trial of drug-related offences including limiting the powers of the court to grant bail notwithstanding that the DDA and s. 41B of the DDA unlike POCA, are not a security-related law passed pursuant to art. 149 of the Federal Constitution that expressly allows the legislation of laws that forsakes certain fundamental liberties. Thus, the court merely exercises powers that is provided by the law and if that power is not granted it cannot be said that there is a usurpation of the judicial power of the court. On that basis, s. 41B of the DDA cannot be said to be unconstitutional.

Issue Of Whether There Has Been An Infringement Of Articles 4, 5 And 8 Of The Federal Constitution

[39] Turning next to the issue on whether s. 41B of the DDA infringes arts. 4 (laws that are inconsistent with the Federal Constitution are void), 5 (liberty of a person) and 8 (equality before the law and equal protection of the law) of the Federal Constitution, Learned counsel for the applicants sought to argue that s. 41B of the DDA is discriminatory and creates inequality in the access to bail and freedom between persons charged under different laws pending the disposal of the trial. In support of his contention learned counsel for the applicants drew a comparison between the right and possibility of an accused charged for the offence of murder to apply for bail under s. 388(1) of the CPC despite it being a non-bailable offence and the absence of that right to an accused charged under s. 39B of the DDA which does not involve the act of taking away a life. The absence of that right is therefore discriminatory and offends arts. 5 and 8(1) of the Federal Constitution.

[40] On the issue of inequality between different class of persons and different laws, this court refers to the oft-quoted Federal Court decision in *PP v. Khong Teng Khen & Anor* [1976] 1 LNS 100; [1976] 2 MLJ 166 where Tun Suffian LP stated:

> The principle underlying art. 8 is that a law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstance, nor that it "must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons … for the purpose of legislation", *Kedar Nath v. State of West Bengal* AIR 1953 SC 404 406. In my opinion, the law may classify persons into children, juveniles and adults, and provide different criteria for determining their criminal liability or the mode of trying them or punishing them if found guilty; the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class; the law may classify offences into different categories and provide that some offences be triable in a Magistrate's court, others in a Sessions Court, and yet others in the High Court; the law may provide that certain

A offences be triable even in a military court; fiscal law may divide a town into different areas and provide that ratepayers in one area pay a higher or lower rate than those of another area, and in the case of income tax provide that millionaires pay more tax than others; and yet in my judgment in none of these cases can the law be said to violate art. 8. All that art. 8 guarantees is that a person in one class should be treated the B same as another person in the same class, so that a juvenile must be tried like another juvenile, a ratepayer in one area should pay the same rate as paid by another ratepayer in the same area, and a millionaire the same income tax as another millionaire, and so on.

[41] That decision was referred to and applied by the later Federal Court C decision in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2020] 3 CLJ 507; [2010] 2 MLJ 333. In delivering the decision of the court, His Lordship Gopal Sri Ram FCJ stated:

> [25] How is the court then to say in a given case that the particular statute under challenge is compliant with the equality clause? The answer lies in D the following passage in the judgment of Suffian LP in *Public Prosecutor v. Khong Teng Khen & Anor* [1976] 2 MLJ 166 ...
>
> ...
>
> [27] The next issue to consider is whether the section violates the equal protection clause. This calls for an interpretation of that clause. The test E here is whether the legislative state action is disproportionate to the object it seeks to achieve. Parliament is entitled to make a classification in the legislation it passes. But the classification must be reasonable or permissible. To paraphrase in less elegant language the words of Mohamed Azmi SCJ in *Malaysian Bar & Anor v. Government of Malaysia* F [1987] 2 MLJ 165, the classification must (a) be founded on an intelligible differentia distinguishing between persons that are grouped together from others who are left out of the group; and (b) the differentia selected must have a rational relation to the object sought to be achieved by the law in question. And to quote that learned judge: 'What is necessary is that there must be a nexus between the basis of classification and the object G of the law in question.' In short, the state action must not be arbitrary. This, then, is the common thread that webs and binds the two limbs of art 8(1). Hence the overlap.
>
> [33] Returning to the present instance the first question to be asked is whether s 46A is a piece of discriminatory legislation. See *Datuk Haji Harun bin Haji Idris v. Public Prosecutor* [1977] 2 MLJ 155. The answer must H surely be in the affirmative because it discriminates against those advocates and solicitors who are either office bearers of a political party or a member of Parliament or both. The next question to ask is whether the discrimination is arbitrary in the sense already discussed. A careful examination of the reasons behind the enactment as revealed in the speech of the Minister for Law and attorney general as reported in I Hansard when introducing s 46A in Bill form to Parliament is to keep the Bar Council free from political influence. It is now settled that resort to Hansard may be legitimately had as a guide to interpreting an Act of Parliament. See *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 3 MLJ

345. As earlier observed, it is in the public interest to have the governing body, namely, the Bar Council, free of any political influence. The section however does not prevent the appellant and those members of the Bar similarly circumstanced as he from attending and speaking at a general meeting of the Bar to put their views across for the purpose of influencing the Bar Council. It follows that the legislative measure under challenge is proportionate to the object it seeks to achieve.

[42] Thus, it is settled law that Parliament is competent to pass a law that is discriminatory. The test is whether the law is proportionate to the objective it seeks to achieve. On this point, the respondent referred to the relevant Parliamentary Hansard dated 10 January 1978 when this amendment was sought to be introduced. The relevant part reads as follows:

Adalah didapati bahawa melepaskan seseorang yang dituduh atas jaminan bagi sesuatu kesalahan di bawah Ordinan ini kerapkali menghampakan tujuan-tujuan pihak pendakwa kerana yang dituduh sama ada terus menjalankan dengan lebih giat lagi urusannya mengedarkan dadah berbahaya dengan tujuan untuk mendapatkan lebih banyak wang bagi melegakan kesan sabitan dan hukuman yang akan diterima, atau, jika ia adalah seorang penagih, ia terus menghisap dadah sehingga ia tidak dapat dipulihkan bila perbicaraannya selesai. Oleh yang demikian, adalah difikirkan bahawa dalam kes-kes yang boleh dikenakan hukuman mati atau penjara selama lebih daripada lima tahun jaminan sekali-kali tidak diberi kepada seseorang yang dituduh, dan di dalam kes-kes yang lain jaminan tidaklah diberi jika Pendakwa Raya memperakui secara bertulis bahawa bukannya bagi kepentingan awam untuk membenarkannya dijamin. Justeru itu, adalah dicadangkan untuk memasukkan suatu Seksyen 41B baharu di dalam Ordinan itu sebagaimana yang dinyatakan dalam Fasal 6 Rang Undang-Undang itu.

[43] Having referred to the Hansard, this court is in agreement with the respondent that the objectives described then are still relevant and applicable today. Quite apart from that, it is not remote and misplaced for this court to state there could also be the risk of flight of the accused and tampering of witnesses in cases that involve the trafficking of drugs worth millions of Ringgit, organised drugs syndicates and the death penalty. It is not uncommon knowledge that the trafficking of drugs involves organised criminal syndicates who will have no hesitation in employing all available methods to escape the law. Whilst an accused is presumed innocent until proven guilty, there is a clear need to mitigate risks that any prosecution of an accused is squandered because of the accused had absconded or witnesses refused to testify for fear of their safety. Section 41B thus creates a class of persons who are prohibited from accessing bail and the creation of that class of persons is proportionate to and justified taking into account the objective of that law. It is in the interest of the public to limit the rights of accused persons falling under s. 41B to be granted bail.

[44] Applying also the reasonable classification test as adopted by the Federal Court in *Danaharta Urus Sdn Bhd* (*supra*) this court holds that taking into account the preamble of the DDA and the purpose of s. 41B as reflected in the Hansard referred above, that provision also satisfies that test. In finding s. 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 ("Danaharta Act") constitutional, the Federal Court took into account the purpose and objective of the Danaharta Act held:

> It is against the background of the law just highlighted that Dato' Mary Lim, the learned senior federal counsel who represented the intervener, submitted to the Court of Appeal that the Act is a special law specifically enacted to meet an economic exigency. She said that it was passed in the public interest and for the public good. She urged the court to take judicial notice of the financial crisis that the world underwent in the dying years of the last century. She also invited the court to have regard to the preamble to the Act which uses the phrase "public good"...
>
> It is now apposite to consider whether s. 72 meets the requirements of the reasonable classification test. What needs to be looked at for this purpose is the object of the Act and the role of s. 72 in attaining that object which have been eloquently set out in the written submission of the appellant ... The object of Parliament in enacting this law has been clearly stated in the Preamble to the Act.
>
> As the Act itself indicates its object in the preamble and the basis of the classification is evident from the language of s. 72 it falls within the first category as classified in *Shri Ram Krishna Dalmia & Others v. Shri Justice S R Tendolkar & Others MR* [1958] SC 538. It is clear that the Act was required in the public interest to promote the revitalisation of the nation's economy. Denial of injunctive relief is absolutely necessary to ensure that the object of the Act is not frustrated. That clearly is the purpose of s. 72 which applies to all persons in the same position as the respondent. Thus it applies equally to all persons who are similarly circumstanced.
>
> The law that we have referred to thus far makes it clear beyond doubt that there will be a violation of art. 8(1) only if a legislation does not apply to a person who is similarly circumstanced as the other persons in the classification – and not to someone like the appellant outside it. The conclusion of the Court of Appeal is therefore wholly unsustainable as it is a total deviation from the law regulating art. 8(1). It is therefore our unanimous view that there is a rational basis between the classification in s. 72 and its object in relation to the Act. Section 72 therefore satisfies the requirements of the reasonable classification test and is not unconstitutional.

[45] Further to that, s. 41B does not in any way curtail the applicant's right to access to justice. Both the applicants are presumed innocent until proven guilty, that is the cornerstone of criminal jurisprudence and administration of justice. Notwithstanding that s. 41B suspends the accused's right to freedom pending final disposal of the trial, the access to a fair trial is not denied. As also held by the Federal Court in *Danaharta Urus Sdn Bhd* (*supra*):

> Access to justice would therefore be a meaningless right without the existence of a court with jurisdiction and power to enable the right to be exercised. Thus access to justice under art. 8(1) is a general right which can be fulfilled only by laws enacted conferring jurisdiction and powers on the courts under the specific authority contained in art. 121(1). While art. 8(1) deals with the right *per se* art. 121(1), on the other hand, confers power on Parliament to set up an institutionalised mechanism with power and jurisdiction to determine the extent and manner in which that right should be exercised. Articles 8(1) and 121(1) are therefore not in conflict but complement each other. The jurisdiction and power of the courts as provided by law is clearly the dominant element which determines the boundaries of access to justice. Article 8(1) cannot therefore be read in isolation. As both the provisions of the Constitution bear upon the same subject they must be read together and be so interpreted as to effectuate the great purpose of the instrument, that is to say, the Federal Constitution. The rule of harmonious construction therefore demands that both the provisions be so construed as to give meaning and effect to them with the result that access to justice shall be available only to the extent that the courts are empowered to administer justice. The corollary is that the manner and extent of the exercise of the right of access to justice is subject to and circumscribed by the jurisdiction and powers of the court as provided by federal law. As a matter of fact whenever a law is passed either enlarging or curtailing the jurisdiction and powers of the courts it has a direct bearing on the right of access to justice. The right is determined by the justiciability of a matter. If a matter is not justiciable there is no right of access to justice in respect of that matter. Thus Parliament can enact a federal law pursuant to the authority conferred by art. 121(1) to remove or restrict the jurisdiction and power of the court.

[46] Thus, this court does not find that s. 41B of the DDA is disproportionate to the objective that it seeks to achieve and therefore there is no infringement of arts. 5 and 8 of the Federal Constitution.

On The Issue That The DDA Is Not A Security Legislation Unlike SOSMA

[47] Learned counsel also sought to argue that whilst the constitutionality and validity of s. 13 of the SOSMA can be defended by reference to art. 149 of the Federal Constitution that empowers the Parliament to enact and pass laws in relation to security matters and that is inconsistent with arts. 5, 9, 10 or 13 of the Federal Constitution, the same cannot be said for s. 41B of the DDA since the DDA is not a law that was passed under the same provision of the Federal Constitution. That being the case, s. 41B cannot be inconsistent with arts. 5 and 8 of the Federal Constitution.

[48] As discussed earlier, s. 41B is a specific law that deals with drug-related offences and since this court holds the view that taking into consideration the purpose of the DDA and the objectives of s. 41B Parliament was empowered to pass such laws, this court does not accept that s. 41B is unconstitutional just because it was not passed pursuant to art. 149 of the Federal Constitution. Section 41B(2) makes it clear that s. 41B(1) shall

A have effect notwithstanding any other written law or any rule of law to the contrary. Such was the intention of Parliament. The derogation of certain rights under the Federal Constitution resulted from the introduction of s. 41B was recognised and affirmed by the Federal Court in *Chew Siew Luan* (*supra*). For the sake of brevity, the relevant portion of the court's decision
B is reproduced again:

> The Dangerous Drugs Act 1952 (Revised-1980) is an Act specifically designed to regulate the importation, exportation, manufacture, sale and use of, *inter alia*, dangerous drugs, and "to make special provisions relating to the jurisdiction of courts in respect of offences thereunder and their
C trial, and for purposes connected therewith". In other words, the Act is in substance a special law passed by Parliament in derogation of the rights of a person concerning the granting of bail in an otherwise ordinary case.

[49] Notwithstanding that the DDA is not classified as a legislation pertaining to any of the matters stated in art. 149 in relation to security
D matters, yet the menace of drug trafficking and its destructive effect on society cannot be denied in any measure. Hence, one must not only look at the accused in isolation but must also look at the entire supply chain in drug trafficking. Every Ringgit spent on drugs goes up to the food chain and ultimately lands in the hands of organised criminals. The same money will
E fund not only further production of drugs but will also lead to the commission of other crimes such as prostitution, human trafficking, money laundering, terrorism and corruption. Battles are fought over distribution of territorial rights and this leads to gang fights and deaths. These matters are not born out of imagination but are hard facts that occur globally and in Malaysia. Thus, in limiting the liberty of an accused who comes within the
F ambit s. 41B, the law seeks to mitigate the risks that such persons will continue to propagate the drug menace until he is proven guilty as charged or freed by a court of law. Applying the same principles of proportionality stated earlier, this court therefore declines to agree with that argument.

[50] It would be also relevant for this court to refer to the decision of
G His Lordship Wan Yahya J (as he then was) in *Loy Chin Hei v. PP* [1981] CLJ 177; [1981] CLJ (Rep) 178; [1982] 1 MLJ 31 where the following was held pertaining to s. 41B of the DDA:

> I have had several occasions to look at s. 41B of the Dangerous Drugs
H Act and it appears to me that the section contains not only express provisions which make the offence absolutely unbailable but also expresses in unequivocal language the intention of the legislature to restrict the judicial discretion as contained in the Criminal Procedure Code and other judge made laws. The expression 'notwithstanding any written law or any rule of law', to my mind, would include the provisions
I of the Criminal Procedure Code and also judge made laws or judicial precedents on bail. Section 41B of the Dangerous Drugs Act, being a particular subsequent legislation, must be construed as having curtailed the discretion to grant bail in drug offences punishable with death or life

imprisonment previously vested in the courts by an earlier general legislation, *ie*, the Criminal Procedure Code. When an Act enacts something in general terms and afterwards another Act on a particular subject introduces in express terms special restrictions on that subject, then the rule of construction demands that the provisions in the subsequent particular legislation should prevail and the provisions of the earlier legislation deemed curtailed or restricted to the extent of its inconsistency with the later legislation but not necessarily repealed.

The discretion as generally given by sections 388, 389 & 394 of the Criminal Procedure Code has been effectively taken away from the courts, both the Subordinate and High Courts, by s. 41B of the Dangerous Drugs Act. Disconcerting as it may be for us to witness the power of the courts, especially those relating to the liberty of the subject who is accused but yet to be proven guilty, being gradually whittled away by statute, yet when Parliament has expressed in unequivocal language its intention to curtail this discretionary power, the courts are not free to question its wisdom in providing for a deterrent procedure for an obviously baneful mischief to society, but must interpret and give effect to the law as it stands.The restriction on bail under s. 41B of the Dangerous Drugs Act is absolute.

[51] Following from the above discussions, this court also holds the view that s. 41B does not offend the principle of presumption of innocence. Whilst it is considered a factor in granting bail, that remains only one of but not the only factor. Taking into account the objective of s. 41B as discussed earlier, there are greater concerns of the society acting through the Parliament that outweighs an accused's comfort of freedom pending disposal of his trial. As held by the Federal Court in *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780; [2019] MLJU 280.

[124] Be that as it may, a provision which violates the presumption of innocence may still be upheld if it is a reasonable limit, prescribed by law and demonstrably justified in a free and democratic society. In this exercise, the Canadian Supreme Court in *R v. Oakes* (*supra*) elaborated on the two central criteria that must be satisfied, at paras. [69]-[70]:

(i) The objective must be of sufficient importance to warrant overriding a constitutionally protected right. The objective must relate to pressing and substantial concerns;

(ii) The means chosen to achieve the objective must be reasonable and demonstrably justified, in that:

(a) the measure must be rationally connected to the objective;

(b) the right in question must be impaired as little as possible; and

(c) the effect of the measure must be proportionate to the objective.

[125] It is clear therefore from the local and foreign authorities above that the presumption of innocence is by no means absolute. However, as discussed above, derogations or limits to the prosecution's duty to prove an accused's guilt beyond a reasonable doubt are carefully circumscribed

A by reference to some form of proportionality test. We consider that the application of the proportionality test in this context strikes the appropriate balance between the competing interests of an accused and the State. (See: *Gan Boon Aun* (*supra*)).

[52] Since this court holds that s. 41B is proportionate to the objective it B desires to achieve, then the principle of presumption of innocence is not offended.

[53] For the all above reasons, this court declines to agree with learned counsel for the applicants that the decision of Mohd Nazlan Ghazali J in *Saminathan Ganesan* (*supra*) where His Lordship had held s. 13 of the SOSMA C prohibiting bail to be unconstitutional is persuasive and should be followed by this court is similarly finding s. 41B of the DDA to be unconstitutional. After carefully considering the approach and reasoning taken by the court in *Saminathan Ganesan* (*supra*) and evaluating that against the approach and reasoning of His Lordship Collin Lawrence Sequeirah J in *Suresh Kumar* D *Velayuthan v. PP* [2020] 4 CLJ 270; [2020] 10 MLJ 549 where His Lordship held the opposite view, this court is inclined to agree with the latter. In this court's view, the principles of law considered and applied by the court in *Suresh Kumar* (*supra*) are equally applicable in the consideration of the issues in the present application and find favour with this court in holding that E s. 41B is a valid and constitutional law. This court agrees with His Lordship that the finding of unconstitutionality of s. 13 of the SOSMA would have dealt a similar blow to s. 41B of the DDA. Conversely therefore, the finding of constitutionality of s. 13 of the SOSMA should in equal breath find s. 41B constitutional as they both relate to the statutory prohibition of bail.

F **[54]** Concluding this court's deliberation on the issue of constitutionality of s. 41B of the DDA, this court therefore holds and reaffirms that the provision of law does not infringe arts. 4, 5 and 8 of the Federal Constitution. It is a valid and constitutionally passed law.

On The Issue Whether Section 388 Of The CPC Could Be Used Despite Section G *41B Of The DDA*

[55] Since this court holds that s. 41B of the DDA is constitutional and valid law, then the next question to be answered is whether s. 388(1) of the CPC can still be employed by this court to consider bail notwithstanding the prohibition under s. 41B. Learned counsel for applicants had conceded that H in the event this court holds that provision valid and constitutional then the consideration of s. 388 of the CPC would become unnecessary.

[56] Nonetheless, for the sake of completeness, as decided in *Chew Siew Luan* (*supra*) and *Abdullah Atan* (*supra*) the DDA is a specific law that deals with drug-related offences. Applying the principle of *generalia specialibus* I *derogant* as discussed and applied in those cases, the provision of the DDA takes precedence over the general provision of the CPC. As shown by

Abdullah Atan (*supra*) the Federal Court decision in *Chew Siew Luan* (*supra*) remains good law. On that basis, s. 388(1) of the CPC cannot be used in any application for bail where s. 41B of the DDA applies.

Issue Of Efficacy Of Section 41B Of The DDA

[57] Considering finally, the argument on the efficacy of s. 41B, learned counsel for the applicants argued that s. 41 of DDA had not been proven to successfully deter offenders punishable with the death sentence. The offences under the DDA continue unabated. On that basis, it was argued that this court must consider the law as being ineffective and thus this court must have the judicial discretion as provided under s. 388(1) of the CPC to grant bail where the merits of a case justifies so. Learned counsel for the applicants postulates that whilst there may be situations where the risk of granting bail is high and therefore should be denied this court should not be deprived of the basic power to grant bail where the risks are lower.

[58] This court does not agree that just because a piece of legislation is not proven to always achieve the mischief that it is intended, the law must then be abandoned. A look at the number of arrests and volume of drugs seized by the authorities and the number of drug-related offences landing at the door of the courts would make that argument fleetingly attractive but to accept it would be overlooking the impact that the DDA has achieved as a whole in combating drug crimes.

[59] One must not confine one's judgment merely on the failures but must equally give attention to the success of the law. The underlying issue is not about the insufficiency or ineffectiveness of the law but is about the determination of criminals to breach the law. Section 302 of the Penal Code cannot be said to fail in deterring people from committing murder just because murders are still being committed. In the end, it's about the never-ending battle by a civil society through the tools of law and enforcement agencies against people who are determined to commit those crimes. No amount of ironclad law can completely overcome the criminal intent of those bent on achieving their criminal objectives. The struggle between the law and the anti-law will not stop and that does not mean the law must be forsaken. Thus, whilst an accused is presumed innocent until proven guilty, the mischief that s. 41B wish to achieve cannot, in this court's view, be frustrated unless otherwise amended by law.

[60] The application cannot therefore be considered on the merits of the applicants' medical issues and gender under s. 388(1) of the CPC.

On The Issue Whether This Court Should Follow The Decision In Puan Saad v. PP

[61] Learned counsel for the applicants has also urged this court to consider and follow the position taken by the High Court in *Puan Saad v. PP* [2021] 1 CLJ 121 where s. 388(1) of the CPC was used by the court to grant bail in favour of an accused charged with an offence under s. 39B of the DDA.

[62] Based upon all the considerations discussed earlier and after reading of the grounds of the decision by the High Court, this court respectfully declines to take the same position as taken by the court in *Puan Saad* (*supra*). That decision being made by a court of co-ordinate jurisdiction to this court is not binding on this court.

Decision

[63] Therefore after considering the applicant's affidavit, affidavits in reply and submissions by learned counsel for the applicants and the respondent finds no basis to agree with the applicants. Section 41B of the DDA applies to both applicants and bail cannot be considered.

[64] The application is therefore dismissed.